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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

MONIQUE ISABEL LEYVA,

Defendant and Appellant.

B271462

(Los Angeles County
Super. Ct. No. KA109156)

APPEAL from a judgment of the Superior Court of Los Angeles County, George Genesta, Judge. Affirmed in part, remanded in part with directions.

Lori A. Quick, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant Monique Leyva pled no contest to one count of felony child abuse (Pen. Code, § 273a, subd. (a))¹ and admitted the special allegation of personally inflicting great bodily injury on a child under age five in the commission of a felony (§ 12022.7, subd. (d)).

Defendant stipulated to the following pertinent facts, as set forth in police and sheriff's department reports. Defendant and her boyfriend, Rudy Carrillo, were homeless methamphetamine users who did not have money to pay for food or shelter for themselves and their seven-week-old son, R.C. On or about May 19, 2014, defendant noticed an indentation on the top of R.C.'s head. Defendant did not seek treatment for R.C. Instead, she left him with her sister, Regina, who agreed to care for him for about a week. Regina reported that R.C. was discolored, dirty, and smelly and did not have a change of clothes with him. She further reported that he did not eat regularly for a few days, but was eating formula every two to three hours and seemed happy and responsive by the end of his visit.

When defendant picked up R.C. on or about May 24, 2014, she noticed that the indentation on R.C.'s head was more pronounced. Defendant and Carrillo both noticed that R.C. was "twitching" after his stay with Regina, and continued to do so over the next several days. Defendant also noted that R.C. was "not responding well to the bottle feed," so she "would use a syringe in an attempt to feed" him. No one reported any of these concerns to a medical professional or social services agency.

Defendant, Carrillo, and R.C. spent the night of May 26, 2014 in a car in Carrillo's sister Jessica's driveway. A neighbor

¹ All further statutory references are to the Penal Code unless otherwise indicated.

told police she heard R.C. crying in an abnormal, “desperate” way when she woke up at 4:30 a.m. on May 27, and heard Carrillo yelling at R.C. to “shut up.” When the neighbor returned home from work around 10:30 a.m., R.C. was still crying. Around 2:00 p.m. or 3:00 p.m., the neighbor went outside and saw R.C. crying and sitting in bright, direct sun. The neighbor suggested to defendant that she move R.C. out of the sun. When she left a short time later, however, the neighbor saw that R.C. was still in the sun.

A few hours later, defendant went to the neighbor’s house and asked if she knew of any healers who could help with R.C.’s sunken fontanel. The neighbor placed her hand on R.C.’s head and noticed that her palm “actually filled in the sunken part.” She also noted that R.C.’s skin looked a little purple. Another neighbor who happened to be passing by recommended someone a few streets away. None of these observers contacted medical professionals or other authorities.

Defendant sought assistance from the recommended holistic healer. The healer attempted to correct R.C.’s sunken fontanel by rubbing oil on his head and pulling gently on his hair. When that proved unsuccessful, she tried to press upward on his palate; that effort failed because R.C.’s “mouth/jaw was locked up, and [the healer] was unable to get her thumb in his mouth.” The healer reported that R.C. was limp during the entire interaction and did not move or react to her, even when she tapped him on the feet and kissed his forehead. The healer told police that she noticed “a pink sugary substance” around R.C.’s mouth, like Kool Aid, and noticed that defendant had a baby bottle filled with the same liquid. Defendant told police R.C. looked noticeably better after the visit with the healer.

Jessica allowed defendant to bring R.C. into her house that evening.² Defendant watched television while R.C. sat on the couch in his car seat; he did not have a crib. He was completely wrapped in a blanket, “with a bottle of Pedialyte placed atop the blanket, with the nipple of the bottle placed next to [his] mouth.” When defendant looked over at R.C. about five minutes “into watching television,” she noticed that his eyes were open “but his body was unresponsive.” She picked up R.C. and noted that he “felt warm and stiff to the touch.” R.C. did not respond when Carrillo poked his shoulder. Jessica drove R.C., defendant, and Carrillo to the hospital.

Efforts to revive R.C. failed. He was pronounced dead at 9:58 p.m. The coroner attributed R.C.’s death to dehydration, malnutrition, and child neglect. His toxicology report was positive for acetaminophen, marijuana, and methamphetamine.

At sentencing, defendant’s counsel read a statement from defendant in which she told the court that she took full responsibility for her actions. Counsel emphasized defendant’s successful participation in numerous programs and classes at the jail. He also informed the court that defendant had four other children, ages seven, five, four, and one month, and wanted to have an opportunity to reconnect with them before they became adults.³ Counsel asked the court to impose the midterm sentence of four years on the child abuse count and stay any sentence on the enhancement. He argued “that would be sufficient to make

² When police visited Jessica’s house the next day, they did not find any formula, baby food, or diapers. They did find a severe cockroach infestation throughout the home, even within R.C.’s car seat.

³ The record indicates that defendant’s three eldest children lived with their father, who had custody of them.

her understand the significance of what actually went on.”

The trial court denied defendant’s request for leniency. It did not question the sincerity of the positive changes defendant had made while in jail, but found no “mitigation whatsoever” in light of the tragic circumstances R.C. endured during his life and death. It also found that defendant abused a position of trust and victimized a particularly vulnerable person. The trial court accordingly sentenced defendant to the high term of six years in state prison on the child abuse count, to be followed consecutively by the high term of six years on the special allegation, and assessed various fines and fees. The court awarded defendant 336 days of actual custody credit, plus 50 days of conduct credit.

Defendant timely appealed, indicating on her notice of appeal that she wished to challenge her sentence or other matters occurring after the plea that did not affect its validity.

Defendant’s court-appointed appellate counsel filed an opening brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, asking this court to independently review the record on appeal. (See *Smith v. Robbins* (2000) 528 U.S. 259, 264-266.) On August 5, 2016, we advised defendant that she had 30 days to file a brief or letter raising any issue she wished this court to consider. We received no response.

This court has examined the entire record in accordance with *People v. Wende, supra*, 25 Cal.3d at pages 441-442, and *People v. Kelly* (2006) 40 Cal.4th 106, 118-119. We are satisfied that defendant’s attorney has fully complied with the responsibilities of counsel and that no arguable issues exist.

Although our review of the record revealed no arguable bases for reversal, it did reveal an error in the abstract of judgment. “An abstract of judgment is not the judgment of

conviction; it does not control if different from the trial court's oral judgment and may not add to or modify the judgment it purports to digest or summarize." (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) Accordingly, "[c]ourts may correct clerical errors at any time, and appellate courts (including this one) that have properly assumed jurisdiction of cases" (*ibid.*), may order correction of clerical errors in an abstract of judgment (*id.* at pp. 185–188). (See also *People v. Scott* (2012) 203 Cal.App.4th 1303, 1324.) The abstract of judgment in this case inaccurately states that defendant's sentence was enhanced pursuant to section 12022.7, subdivision (h) rather than section 12022.7, subdivision (d). We therefore direct the court to correct the abstract of judgment and forward a copy of the corrected abstract to the Department of Corrections and Rehabilitation.

DISPOSITION

The judgment of conviction is affirmed. The matter is remanded to the trial court with directions to prepare an amended abstract of judgment reflecting an enhancement under Penal Code section 12022.7, subdivision (d), rather than Penal Code section 12022.7 subdivision (h), and to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

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COLLINS, J.

We concur:

EPSTEIN, P. J

MANELLA, J.